No. 520

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

In the Matter of the Liquidation

of

NATIONAL SURETY COMPANY

Claim of WILLIAM F. LAUGHLIN, as Administrator *de bonis non* of the Estate of Wesley Cooper, Deceased.

**Claim No. C. B. 2262.**

WILLIAM F. LAUGHLIN, etc.,
*Petitioner,*
*(Claimant-Appellant below),*

—against—

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of National Surety Company,
*Respondent,*
*(Petitioner-Respondent below).*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

OSCAR R. HOUSTON,
FRANCIS X. NESTOR,
*Of Counsel.*

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**Claim No. C. B. 2262.**

WILLIAM F. LAUGHLIN, etc.,
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—against—

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of National Surety Company,
*Respondent,*
*(Petitioner-Respondent below).*

## *PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK.*

*To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:*

Your petitioner respectfully shows:

This is a petition for a writ of certiorari to the Supreme Court of the State of New York, New York

County, to review a decision of the New York Court of Appeals dated May 28, 1940, affirming a final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (fols. 178-183), which affirmed, without opinion, an order of Special Term of the Supreme Court, New York County (fols. 10-14), confirming the disallowance of the claim by a referee (fols. 142-162).

## I.

### Summary Statement of the Matter Involved.

Your petitioner is the Administrator *de bonis non* of the Estate of Wesley Cooper, who died March 21, 1919, a resident of Washington County, State of Mississippi (fols. 111 to 115).

On September 14, 1932, National Surety Company executed an administrator's bond, in the sum of $6,000, for an administrator of the goods, chattels, etc., of said Wesley Cooper, in favor of the State of Mississippi (fols. 106 to 110). The bond was executed and delivered in the State of Mississippi and was filed with the Chancery Court of that State on September 20, 1932 (fols. 106-108).

Prior to that date National Surety Company had complied with the laws of Mississippi governing the admission of foreign insurance corporations (fols. 61 and 62), had been duly licensed to engage in business in that State, and concededly had irrevocably appointed the Commissioner of Insurance of Mississippi its agent for the service of process, as required by Mississippi statutes (fol. 149).

On November 14, 1932, the administrator received from the United States Government the sum of

$5,847, the proceeds of a war risk insurance policy covering the life of decedent as a soldier of the United States in the World War (fols. 75-76).

On March 27, 1934, the administrator was directed by the Chancery Court to account (fol. 90). He disregarded the order and was removed on April 5, 1934 (fol. 90) by a decree which directed him to surrender all assets of the estate. This direction was likewise disregarded (fols. 90 and 91). During his tenure as administrator, and prior to July 24, 1933, the original administrator misappropriated or misapplied all assets of the estate, amounting to $5,847 (fols. 76-77, 99).

National Surety Company was dissolved on June 1, 1934, by order of the Supreme Court of the State of New York, New York County, which directed that all claims be filed by April 1, 1935 (fols. 116 to 140).

Sworn proofs of claim, based on the *devastavit* of the original administrator, were filed with the respondent, as Liquidator of National Surety Company (fols. 85 to 100).

In February, 1936, your petitioner, as administrator *de bonis non*, and Mimie Cooper, widow of Wesley Cooper, instituted suit on the bond in the Chancery Court, Washington County, Mississippi, against National Surety Company. The summons was served on the Commissioner of Insurance of Mississippi, whom National Surety Company, pursuant to the requirements of Section 5165 of the Mississippi Code, and as a condition of its being permitted to engage in business in that State, had irrevocably designated as its agent to receive process. On February 24, 1936 the Commissioner of Insurance delivered the summons to the respondent, as Liquidator of National Surety Company, in New York City (fol. 29).

National Surety Company defaulted in appearance and answer, and on March 12, 1936, judgment by default was entered against the Company in the sum of $6,709.52 (Claimant's Ex. 1, fols. 70 to 84).

Thereafter, the Liquidator disallowed the claim, and the matter was referred to a referee. At the hearing before the referee the following documents were received in evidence in support of the claim:

1. A judgment in the sum of $6,709.52 rendered by the Chancery Court of Mississippi, in favor of claimant and against National Surety Company, entered March 12, 1936 and duly authenticated in accordance with the Acts of Congress (Cl. Ex. 1, fols. 70 to 84).

2. Original sworn proof of claim filed February 18, 1935 (Cl. Ex. 2, fols. 85 to 94).

3. Amended sworn proof of claim filed October 3, 1935 (Cl. Ex. 3, fols. 95 to 100).

4. The bond in suit (Cl. Ex. 5, fols. 106 to 110).

5. Letters of administration issued to William F. Laughlin, the claimant herein (Cl. Ex. 6, fols. 111 to 115).

The referee confined his report solely to the validity of the Mississippi judgment. He concluded that the judgment was a nullity and recommended that the claim be disallowed. Special Term of the Supreme Court, without opinion, confirmed the report, and the Appellate Division unanimously affirmed, without opinion, the order of Special Term. On December 15, 1939, the Appellate Division denied

petitioner's motion for leave to appeal to the Court of Appeals. On January 12, 1940, the Court of Appeals granted leave to appeal.

The appeal was argued before the Court of Appeals on April 9, 1940, and, on May 28, 1940, said Court unanimously affirmed the order appealed from, with an opinion by Judge Finch which is reported in 283 N. Y. 68.

On August 12, 1940, Hon. Stanley Reed, Associate Justice of the Supreme Court of the United States, made an order extending to October 24, 1940, the time within which petitioner might apply to this Court for a Writ of Certiorari.

By order dated October 9, 1940, the Court of Appeals granted your petitioner's motion to recall and amend the Remittitur for the purpose of showing that questions under the Constitution of the United States had been presented and necessarily passed upon by the Court of Appeals in its determination of this case. On October 17, 1940, the Remittitur as amended was remitted to the Supreme Court, New York County, and is presently in the custody of said Court.

## II.

### Reasons Relied on for the Allowance of the Writ.

The New York Court of Appeals has decided federal questions of the utmost importance in holding:

1. That a valid *in personam* judgment cannot be obtained, after dissolution, against a foreign insurance corporation in a forum in which the contract was made and in which the liability thereunder accrued, although such corporation as a condition of its admittance has irrevocably

designated a statutory agent for the service of process, and although the laws of the State to which the corporation has been admitted expressly continue the existence of such corporation for a period of three years after dissolution for the purpose of suing and being sued.

2. That although the State of Mississippi has insured to its citizens the right to obtain, in its Courts, a valid judgment against a New York insurance corporation engaged in business in Mississippi and thereafter dissolved in New York, a judgment so obtained is void in New York and not entitled to full faith and credit under Article 4, Section 1 of the United States Constitution.

3. That the statutes enacted by the State of Mississippi for the protection of its citizens, imposing conditions on a New York corporation seeking admittance, may be emasculated and rendered nugatory by the simple expedient of an order of the New York Supreme Court in a dissolution proceeding.

4. That while citizens of Mississippi may be divested of the contractual rights acquired through contracts entered into in that State, such procedure does not impair the obligations of contract and does not violate Article 1, Section 10 of the United States Constitution.

5. That the irrevocable designation by National Surety Company of the Commissioner of Insurance of Mississippi as its statutory agent for service of process is "analogous to a power of attorney granted by an individual which ceases upon the death of that individual."

The decision of the New York Court of Appeals conflicts squarely with the decisions of the Supreme Court of the United States in the following cases:

*Washington ex rel. Bond & Goodwin and Tucker* v. *Superior Court*, 289 U. S. 361;
*Clark* v. *Williard*, 292 U. S. 112;
*Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165;
*Penn. Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93.

The precise federal questions raised herein are of great significance to the public at large. The successive steps by which the several States have endeavored to formulate a uniform, workable plan, consistent with the safeguarding of the interests of their own citizens, under which foreign corporations may be admitted to engage in business, and to clarify the procedure with respect to insolvent insurance corporations, will definitely be impeded by this decision.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of New York, New York County, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the case numbered and entitled on its docket No. 16491—1933, William F. Laughlin, as Administrator *de bonis non*, of the Estate of Wesley Cooper, Appellant, v. Louis H. Pink, Superintendent of Insurance of the State of New York, as Liquidator of National Surety Company, Respondent, to the end that this cause may

be reviewed and determined by this Court as provided for by the statutes of the United States; and that the order and judgment of said Court of Appeals be reversed by this Court, and for such other and further relief as to this Court may seem proper; and your petitioner will ever pray.

Dated, New York City, October 22, 1940.

WILLIAM F. LAUGHLIN,
as Administrator *de bonis non*
of the Estate of Wesley
Cooper, Deceased.
By OSCAR R. HOUSTON,
FRANCIS X. NESTOR,
Counsel for Petitioner.

## *BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.*

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### I.

### Opinions of Courts Below.

The opinion of the Court of Appeals is reported in 283 N. Y. 68, and is appended to the record. No opinion was rendered by either the Appellate Division or Special Term of the Supreme Court. The report and opinion of the referee appear in the record (fols. 142-162) and are not otherwise reported.

### II.

### Jurisdiction.

1. The date of the order and judgment of the Court of Appeals is May 28, 1940. By order dated August 12, 1940, Hon. Stanley Reed, Associate Justice of the Supreme Court of the United States, extended to October 24, 1940, the time within which petitioner might apply to this Court for a Writ of Certiorari.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936.

3. The Court of Appeals has stated in its amended remittitur the questions under the United States Constitution presented and necessarily passed upon by that tribunal in arriving at its decision.

## III.

### Statement of the Case.

This has already been stated in the preceding petition under 1 (pp. 2 to 5).

## IV.

### Specifications of Error.

The Court of Appeals erred in holding:

1. That the order of dissolution by the New York Supreme Court terminated the corporate existence of National Surety Company in all respects and that a judgment thereafter obtained in another State is null and void.

2. That the judgment of the Chancery Court of Mississippi is void in New York and not entitled to be accorded, by the Courts of the State of New York full faith and credit under Article IV, Section 1, of the Constitution of the United States.

3. That the proceedings in the State of Mississippi did not furnish an adequate basis for an *in personam* judgment.

4. That the proceedings taken under Article XI of the New York Insurance Law revoked the designation of the Commissioner of Insurance of Mississippi as statutory agent of National Surety Company and limited the time within which said Company might, under Mississippi statutes, be sued in that State, but that such proceedings nevertheless did not impair

petitioner's contractual rights or violate the provisions of Article 1, Section 10 of the United States Constitution.

5. That the irrevocable designation by National Surety Company of the Commisisoner of Insurance of Mississippi as statutory agent for the service of process is analogous to a "power of attorney which ceases with the death of the individual" who granted it.

## V.

## Argument.

### Summary of the Argument.

Point I. The judgment of the Chancery Court of Mississippi rendered by a court possessing jurisdiction both of the parties and the subject matter, is a judgment *in personam*, is valid in all respects and is entitled to full faith and credit in the State of New York, pursuant to Article 4, Section 1 of the Constitution of the United States. Furthermore, it is competent evidence in this proceeding and is determinative of the rights and liabilities of the parties.

Point II. The irrevocable designation by National Surety Company of the Mississippi Commissioner of Insurance as statutory agent for the service of process, and the Surety Company's acquiescence in the provisions of Section 4171 of the Mississippi Code which continued corporate existence for a period of three years after dissolution for the purpose of suit, constituted "true contracts" and to the extent that Article XI of the New York Insurance Law

operated to revoke the designation and limit the time for suit in Mississippi, on contracts made and required to be performed in that State, the latter statute impairs the obligations of contract and violates Article 1, Section 10 of the United States Constitution.

## POINT I.

**The judgment of the Chancery Court of Mississippi is valid in all respects and is entitled to full faith and credit under Article IV, Section I, of the Constitution of the United States.**

### A.

**The decree of dissolution did not terminate the corporate existence of National Surety Company for all purposes: It might still sue and be sued because its existence was continued by statute.**

The Court of Appeals held that the order of the New York Supreme Court, dissolving National Surety Company and annuling its charter, terminated the existence of the corporation and that a judgment thereafter obtained was a nullity and void in New York. That such result follows dissolution at common law, we do not dispute.

However, there was in force in the State of Mississippi, at all times material herein, a statute continuing the existence of foreign corporations admitted to do business in that State, and thereafter dissolved, for a period of three years after dissolution for the purpose of suing and being sued. Section 4171 Miss. Code (fols. 38 and 39).

The Supreme Court of Mississippi has ruled expressly that this statute applies to New York Insurance Corporations admitted to do business in Mississippi and later dissolved in New York.

> *Rawlings* v. *American Oil Co.*, 173 Miss. 683;
> *Universal Life Insurance Co.* v. *Catchings*, 169 Miss. 26.

Furthermore, National Surety Company, as a condition of its admission, irrevocably designated the Commissioner of Insurance as its agent for the service of process, as required by Section 5165 of the Mississippi Code (fols. 61 and 62, 149). The Supreme Court of Mississippi, in construing this statute, which is in *pari materia* with Section 4171, stated:

> "The purpose of the statute was to domesticate foreign insurance companies in this state, so far as suits against them were concerned, in that respect that they should stand exactly as if they were domestic insurance companies. The word 'liability' in the statute is not confined to contracts alone, but to any liability cognizable in the Courts. As long as there is any outstanding liability, the insurance commissioner's authority cannot be revoked, and until revoked he is the agent of the company for the service of process."
>
> *Universal Life Insurance Co.* v. *Catchings*, *supra*.

Where such statutes exist, the common law rule does not apply; corporate existence, for the purpose of suit, survives dissolution and a judgment thereafter obtained is valid and binding upon the parties.

> *Clark* v. *Williard*, 292 U. S. 112;
> *Washington ex rel. Bond and Goodwin and Tucker* v. *Superior Court*, 289 U. S. 361.

Although the cases last referred to are directly in point and were stressed on the appeal, the Court of Appeals neither discussed nor cited them in its opinion.

On the other hand, the cases cited in the opinion of the Court of Appeals in support of the conclusion that a judgment obtained after dissolution is a nullity, did not, in a single instance, involve statutes continuing corporate existence after dissolution. The Supreme Court of the United States in *Clark* v. *Williard*, 292 U. S. 112, recognized this distinction, took pains to point it out, and held that said cases are not controlling where the continuance of corporate existence is provided for by statute.

**B.**

**Service on the Commissioner of Insurance imparted full jurisdiction *in personam* to the Chancery Court.**

The designation of the Mississippi Insurance Commissioner by National Surety Company was irrevocable, and continued in force so long as any liabilities of the company remained outstanding in Mississippi. Section 5165, *Mississippi Code; Universal Life Insurance Co.* v. *Catchings*, 169 Miss. 26.

Section 5165 provides that service on the Commissioner "shall be of the same force and validity as if served on the Company". The Chancery Court possessed jurisdiction *in personam*.

*Penn. Fire Insurance Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93;

*Neirbo Co.* v. *Bethlehem Shipbuilding Co.*, 308 U. S. 165, 175;

*Pennoyer* v. *Neff*, 95 U. S. 714;

*Bagdon* v. *Phil. & Reading C. & I. Co.*, 217 N. Y. 432, 436-7.

The judgment of the Chancery Court, being *in personam*, its efficacy is not confined to Mississippi. It is an adjudication on the merits and is conclusive as to the matters therein decided. *Sistare* v. *Sistare*, 218 U. S. 1. As such, it constitutes competent evidence in this proceeding. *Matter of Casualty Co. of America*, 206 App. Div. (N. Y.) 314. And, as a valid judgment of a court of competent jurisdiction of a sister state, it is entitled to be accorded full faith and credit by the Courts of the State of New York pursuant to Article IV, Section 1 of the United States Constitution.

*Titus* v. *Wallick*, 306 U. S. 282;
*Clark* v. *Williard*, 292 U. S. 112.

## POINT II.

**Article XI of the New York Insurance Law (Cons. Laws, Ch. 28, Sec. 407), to the extent that it operates to revoke the designation of the Mississippi Commissioner and to limit the time for suit in Mississippi, impairs the obligations of contracts and violates Article I, Section 10 of the Constitution of the United States.**

The Court of Appeals held that the proceedings taken in New York terminated for all purposes the corporate existence of National Surety Company, cancelled the irrevocable designation of the Mississippi Commissioner, nullified Section 4171 of the Mississippi Code, but nevertheless did not impair the

petitioner's contractual rights and did not violate Article 1, Section 10, of the United States Constitution.

In explanation of this "most unusual paradox" the Court asserted that the designation of the Commissioner of Insurance as statutory agent "was analogous to a power of attorney granted by an individual, which ceases upon the death of that individual". Yet the Supreme Court of the United States held as recently as November, 1939, that "The stipulation is, therefore, a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent", and further, "A statute calling for such a designation is constitutional". *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 175.

The bond in suit was executed and delivered in Mississippi, countersigned by the Surety Company's resident agent in that state (fols. 106 to 110). *It is a Mississippi contract. U. S. Mortgage & Trust Co.* v. *Ruggles*, 258 N. Y. 32.

The State of Mississippi had the right to require that National Surety Company subject itself to the laws of that State, as a condition of being allowed to engage in business therein.

*Clark* v. *Williard*, 292 U. S. 112.

The voluntary Act of National Surety Company in making itself amenable to the provisions of Section 5165 and Section 4171 of the Mississippi Code, requiring that a foreign corporation engaged in business in that State designate the Commissioner of

Insurance as agent for the service of process, and providing for continued corporate existence for a period of three years after dissolution, for the purpose of suing and being sued, constituted "true contracts" in and of themselves, became an integral part of the bond in suit and enured to the benefit of the obligees under the bond in suit, Cooper's legal representatives and the distributees of his estate.

*Bagdon* v. *Phil. & Reading C. & I. Co.*, 217 N. Y. 432, 436, 437;
*Woodward* v. *Mutual Reserve Life Ins. Co.*, 178 N. Y. 485, 489.

The Legislature of the State of New York is without power to enact laws purporting to have extraterritorial effect on contracts made outside that State. *U. S. Mortgage & Trust Co.* v. *Ruggles*, 258 N. Y. 32, 40, 41. Yet, the Court of Appeals has now construed Article XI of the New York Insurance Law as having the effect of revoking the Mississippi Commissioner's authority, and of cutting down the time within which National Surety Company might, under Section 4171 of the Mississippi Code, be sued in Mississippi on contracts made in that State. As the result of this interpretation Article XI abrogates the contractual rights of the parties, impairs the obligations of contract, and constitutes an invalid exercise of the legislative power and a violation of Article 1, Section 10 of the Constitution of the United States.

*Mutual Life Insurance Co.* v. *Cohen*, 179 U. S. 262;

*U. S. Mortgage & Tr. Co.* v. *Ruggles*, 258 N. Y. 32, 40, 41.

This Court has heretofore decided that a valid judgment may be obtained after dissolution against a foreign corporation in a state to which it has been admitted if, as a condition of such admission, it has designated a statutory agent upon whom process may be served.

*Clark* v. *Williard*, 292 U. S. 112; 294 U. S. 211;
*Washington ex rel. Bond and Goodwin and Tucker* v. *Superior Court*, 289 U. S. 361.

This Court has also held that service on a statutory agent imparts jurisdiction *in personam*.

*Penn. Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93.

There appears to be no decision, however, combining these two features, viz., that a valid judgment *in personam* may be obtained after dissolution against a foreign corporation in a state to which it has been admitted and in which, as a condition of such admission, it has designated a statutory agent. The decision called for in the instant case represents the next logical, and the final, step in the direction indicated by this Court in the cases last mentioned. The determination by this Court of the question here presented will reblaze the trail temporarily obscured by the unsound decision of the New York Court of Appeals.

## *CONCLUSION.*

***It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.***

Respectfully submitted,

OSCAR R. HOUSTON,
FRANCIS X. NESTOR,
*Of Counsel.*

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK.

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## BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

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In the Matter of the Liquidation

*of*

NATIONAL SURETY COMPANY

Claim of WILLIAM F. LAUGHLIN, as Administrator *de bonis non* of the Estate of Wesley Cooper, Deceased. Claim No. C. B. 2262.

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WILLIAM F. LAUGHLIN, etc.,

*Petitioner*

(Claimant-Appellant below),

*against*

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of National Surety Company,

*Respondent*

(Petitioner-Respondent below).

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK.

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## BRIEF FOR THE RESPONDENT IN OPPOSITION.

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### The Opinions Below.

The opinion of the Court of Appeals is reported in 283 N. Y. 68, and is appended to the record. Neither the Appellate Division of the Supreme Court, First Department, nor

the Special Term of the Supreme Court, New York County, rendered opinions. The report of the referee appears in the record (fols. 142-163) and is not otherwise reported.

## Questions Presented.

1. Whether the final decree entered in an action instituted by service of process upon the former statutory agent in the State of Mississippi against National Surety Company after its dissolution in the State of New York, was binding on its Liquidator in the State of New York and entitled to full faith and credit in the State of New York?

2. Whether, in view of the admission of National Surety Company to do business in the State of Mississippi as a foreign corporation accompanied by its charter and the statutory laws applicable to its creation and dissolution, the revocation of the authority of the statutory agent of National Surety Company in Mississippi by operation of law on the dissolution of its corporate existence in New York, impairs the obligation of contracts made in Mississippi and violates Article 1, Section 10 of the United States Constitution?

## Statement.

On September 14, 1932 National Surety Company executed a bond (fols. 106-110) in the sum of $6,000.00 for Robert L. Jayne, as administrator of the estate of Wesley Cooper, deceased in favor of the State of Mississippi; on September 20, 1932 said bond was filed in the Chancery Court of Washington County, State of Mississippi. The entire estate received by the administrator was the sum of $5,847.00, the proceeds of a war risk insurance policy covering the life of Wesley Cooper as a soldier of the United States in the World War of 1914-1918 (fol. 76).

On June 1, 1934 the Superintendent of Insurance of the State of New York, pursuant to Article XI of the New

York Insurance Law, was authorized and directed by order of the Supreme Court of the State of New York, New York County (fols. 116-141) to forthwith take possession of and liquidate the business and property of National Surety Company. Said order further provided for the filing of claims on or before April 1, 1935 (fols. 134, 135), for the dissolution of the Company's charter (fol. 140), for the vesting of title in the Superintendent as Liquidator of all the property, contracts and rights of action of said Company (fol. 123), for the restraining and enjoining of directors, officers, agents, etc., from the further transaction of any of the business of the Company or from permitting anyone to obtain judgments against said Company or its liquidator (fols. 137, 138), and for the restraining and enjoining of any and all persons from bringing or further prosecuting any action at law, suit in equity, or proceeding, special or otherwise (fols. 138-140).

On April 5, 1934, by decree of said Mississippi Chancery Court, Robert L. Jayne was removed as administrator and one Bessie C. Hillery an alleged heir of the deceased, was duly appointed as administratrix *de bonis non* (fol. 90). On February 18, 1935 said administratrix filed proof of claim with the Liquidator of National Surety Company (fols. 85-95) in the sum of $1,847.00 with interest, wherein is recited the facts of the removal of Robert L. Jayne, the appointment of Bessie C. Hillery, that Robert L. Jayne, as administrator had distributed only $4,000.00 of said $5,847.00, that Robert L. Jayne had been directed to pay over to the administratrix the remaining sum of $1,847.00 and his failure to make said payment.

On September 11, 1935 by decree of said Chancery Court, Bessie C. Hillery was removed as administratrix and on the following day, William F. Laughlin (hereinafter referred to as "Claimant") was appointed administrator *de bonis non* (fols. 96, 97).

On October 3, 1935 the Claimant filed with the Liquidator an amended proof of claim (fols. 96-101) in which he states

that following the filing of the original proof of claim, it was discovered that one Mimie Cooper was the surviving lawful widow of the deceased herein and entitled to the entire estate; that Bessie C. Hillery had received $1,000.00 of the $4,000.00 distributed by Robert L. Jayne; that the entire distribution of $4,000.00 was an unlawful disbursement; and that there was a misappropriation of the sum of $1,847.00. Claim was thus made for the sum of $5,847.00 representing the original estate as received by Robert L. Jayne.

On March 12, 1936 in an action entitled *"Mimie Cooper et al., Plaintiffs* v. *National Surety Company, Defendant"*, in the aforementioned Chancery Court a decree *pro confesso* (fols. 70-72) and a final decree (fols. 73-80) were made and filed. The former decree recited that National Surety Company had been duly served with a summons in said action and had wholly defaulted in appearing therein; the latter, after setting forth the appointment of Robert L. Jayne and his alleged wasting of the estate, adjudged that Mimie Cooper was the sole distributee of said estate and that she was entitled to recover from the National Surety Company the sum of $6,709.52 for which the Claimant was forthwith directed to file with the Liquidator of National Surety Company.

The claim not having matured on or before April 1, 1935 and being purely contingent under our laws, the Liquidator recommended the amended claim for disallowance to the Supreme Court, New York County; the Claimant filed objections thereto (fols. 101-106). The issues thus raised were referred to a Referee to hear and report.

Although the statement of facts herein and those found in the proof of claim (fols. 85-95) and the amended proof of claim (fols. 96-101) tend to show a misappropriation of the Estate herein, either in whole or in part, the only evidence offered by the Claimant on the hearings before the Referee in substantiation of the amended claim was the production of the decree *pro confesso* (fols. 70-72) and the final decree (fols. 73-80) whereby, after its liquidation,

National Surety Company, not its Liquidator, was allegedly served in an action in the Chancery Court of Washington County, Mississippi, and was declared liable under the bond herein on default in answering. No attempt was made to prove any wrongdoing by Robert L. Jayne whom National Surety Company bonded. In fact, this procedure was commented on by the Referee at the hearing (fols. 42-44).

The Referee's report was confirmed by order of Special Term of the Supreme Court, New York County (fols. 10-14). The Appellate Division of the Supreme Court, First Department unanimously affirmed said order (R. 58) and the Court of Appeals, after granting leave to appeal, unanimously affirmed the latter order (R. 73) with opinion (R. 62).

## Summary of Argument.

The corporate existence of National Surety Company was dissolved pursuant to Article XI (now Article XVI) of the Insurance Law of the State of New York. The authority and functions of all agents, including statutory agents, were immediately revoked. All actions pending or thereafter instituted abated and judgments thereafter entered were null and void against the assets in the State of New York. The Mississippi decree in favor of the Claimant, even according to the law of Mississippi, and if valid at all, was valid only as to assets in Mississippi but was without force or effect in New York which was not called upon to accord full faith and credit to the decree. The designation of the statutory agent in Mississippi carried with it the revocation thereof upon dissolution which was contemplated by contracting parties in Mississippi and thus the contracts were not impaired when revocation occurred.

## POINT I.

**The decree entered in Mississippi is null and void as to assets held by the Liquidator of National Surety Company in New York and is not entitled to full faith and credit under Article IV, Section 1 of the Constitution of the United States.**

### A.

**On the entry of the order of liquidation dated June 1, 1934, the corporate charter of National Surety Company was dissolved and its corporate existence terminated pursuant to the provisions of the Insurance Law of the State of New York.**

The Claimant, to sustain his claim against the assets of National Surety Company, did not offer any common law proof of the alleged wrongdoing by Robert L. Jayne, the principal on the bond of National Surety Company, but relied solely on a decree *pro confesso* (fols. 70-73) and a final decree (fols. 73-80) both of which were entered against National Surety Company in the Chancery Court of Washington County, State of Mississippi, in an action instituted in said Court subsequent to June 1, 1934, the date of the order of liquidation and of the dissolution of National Surety Company.

A corporation is domiciled in the state of its incorporation; it is a creature of, and its continuance is dependent upon, the laws of that state (*Martyne* v. *American Union Fire Ins. Co.*, 216 N. Y. 183, 193). As an artificial entity the legislature that instilled its life, has conversely the exclusive power to cut off, dissolve and revoke its existence (*People* v. *Globe Mutual Life Insurance Co.*, 91 N. Y. 174, 179; *Ewen* v. *American Fidelity Co.*, 271 Fed. 848, 853).

National Surety Company was incorporated under the Insurance Laws of the State of New York. On June 1, 1934 by order of the Supreme Court of the State of New York,

New York County (fols. 115-141) it was placed in liquidation under the Superintendent of Insurance of the State of New York pursuant to Article XI of the Insurance Law of the State of New York (L. 1932, ch. 191, now Article XVI as amended by L. 1939, ch. 882). The order provided for the dissolution of the Company (140).

The New York Courts were called upon to interpret the statutes of the State of New York as to whether the dissolution of the Company was governed by the General Corporation Law (Cons. Laws, ch. 23, Section 29) providing for continuance of corporations generally for winding up corporate affairs or the Insurance Law (Cons. Laws, ch. 28, Section 407, now section 525 in substance), providing for immediate cessation of corporate existence. The conflict between the provisions of these statutes is governed by General Corporation Law, Section 6, which was held to be applicable herein.

This section reads as follows:

> "If there be in any other corporate law a provision which conflicts with any provision of this chapter or of the stock corporation law, the provision of such other corporate law shall prevail, and the conflicting provision of this chapter or of the stock corporation law shall not apply in such case. If there be in any other corporate law a provision relating to a matter embraced in this chapter or in the stock corporation law, but not in conflict therewith, both provisions shall apply."

In accordance therewith the Court of Appeals and the lower Courts with unanimity found that the Insurance Law prevailed and that the corporate existence of National Surety Company ceased on June 1, 1934. This interpretation of the New York Statutes is the law of this case and will be recognized as such by this Court (*Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78).

The *rationale* behind the rule or provision of law in this State (Article XI of the old law—Article XVI of the present

law), providing for the dissolution of corporations upon their insolvency and the enjoining suits then pending or about to be brought in this State or elsewhere, is clearly to protect all the creditors of the dissolved company, to secure uniformity of decision, by compelling the adjudication of all claims in the New York liquidation proceedings, to insure a speedy determination of the outstanding liabilities, to maintain an orderly process of liquidation and to relieve the Liquidator and the assets of the insolvent company from the expense and annoyance of defending suits in all the other States of the Union.

Practically, a liquidator could neither afford to defend actions brought in other states because of the prohibitive expenses involved nor could he afford to allow the suits to proceed undefended, if judgments by default become allowable claims without further competent proof other than the judgment itself, because of the injustice that would result to creditors in the state of dissolution by the unwarranted depletion of the assets from which dividends would be declared.

**B.**

**All actions either pending or thereafter instituted abated upon the dissolution of National Surety Company and judgments subsequently entered are null and void. The decree entered herein is null and void, has no extraterritorial effect and is not entitled to full faith and credit in the State of New York.**

All persons who contracted or did business with the National Surety Company had constructive knowledge of the statutes governing its liquidation and termination of its corporate existence on dissolution, and are bound by said statutes containing the rules and regulations of such liquidation (*People* v. *Globe Mutual Life Insurance Co.*, 91 N. Y. 174, 179; *Jemison* v. *C. S. Bank*, 122 N. Y. 135, 140; *Susquehanna Line, Inc.* v. *Auditore*, 223 App. Div. 585, 588). This is likewise true as to persons outside the state of incor-

poration (*Relf* v. *Rundle,* 103 U. S. 222, 225; *Canada Southern Railroad Co.* v. *Gebhard,* 109 U. S. 527, 537; *Martyne* v. *American Union Fire Insurance Co.,* 216 N. Y. 183, 193).

Since the corporate existence of National Surety Company ceased for all purposes, everywhere on June 1, 1934 the common law rule became applicable that on dissolution of a corporation all actions pending or thereafter instituted abated and judgments thereafter entered are null and void.

*First National Bank of Selma* v. *Colby,* 88 U. S. 609, 615; (21 Wall);
*Pendleton* v. *Russell,* 144 U. S. 640, 645; affirming *People* v. *Knickerbocker Life Insurance Co.,* 106 N. Y. 619;
*Oklahoma Natural Gas Co.* v. *Oklahoma,* 273 U. S. 257, 259;
*Rodgers* v. *Adriatic Fire Insurance Co.,* 148 N. Y. 34, 38;
*Ewen* v. *American Fidelity Co.,* 271 Fed. 848, 851 (C. C. A. 2nd).

The statutes of a foreign jurisdiction can in no way change, modify or nullify the effectiveness of the dissolution of a corporation in the state of incorporation (*Marion Phosphate Co.* vs. *Perry,* 74 Fed. 425; *Clinton* v. *Coppedge,* 2 Fed. Supp. 935; *Sinnott* v. *Hanan,* 214 N. Y. 454, 458; *Matter of Lehrich* v. *Sixth Avenue Bancorporation, Inc.,* 251 App. Div. 391, 394) and even though said statutes continue the corporate life of all corporations after dissolution for a particular time, as far as dissolved foreign corporations are concerned, these only apply to winding up the affairs of such corporations located in the foreign jurisdiction (*Restatement, Conflict of Laws,* Section 158, Chapter 6, Subdivision d, page 230). Thus judgments, entered against the dissolved corporation in a foreign jurisdiction, are null and void in the state of incorporation and are only valid as to local assets found in the foreign jurisdictions (*Rawlings* v. *American Oil Co.,* 173 Miss. 683; 161

So. 851, 854; *Oliner* v. *American Oriental Banking Corp.*, 252 App. Div. 212; affirmed 277 N. Y. 588).

In the Rawlings case, *supra*, the Supreme Court of Mississippi in construing and determining the validity of a judgment entered in Mississippi against the New York Indemnity Company after its dissolution in New York and entered after service of process upon the statutory agent in Mississippi found that Section 4171, Mississippi Code of 1930, changed the common law rule on the abating of all actions on dissolution and held that although corporations both domestic and foreign continue for a period of three years after dissolution that "only the assets of a foreign corporation located in this State could be affected."

The decree of Claimant was therefore valid only against assets of the former National Surety Company in Mississippi, had no extraterritorial effect and was not entitled to full faith an dcredit in the State of New York as against assets in the possession of the Liquidator of National Surety Company.

The authorities relied upon by the claimant are inapplicable to the facts herein. In *Clark* v. *Williard*, 292 U. S. 112 this Court was not confronted with an attempt by a creditor to satisfy his claim out of assets held by the domiciliary liquidator in the state where the corporation was dissolved but rather with an execution on funds of the dissolved corporation in the state where the claimant resided. It is submitted that the State of Mississippi has already declared its policy in this respect (*Rawlings* v. *American Oil Co.*, 173 Miss. 683; 161 So. 851).

In *Washington ex rel. Bond and Goodwin and Tucker* v. *Superior Court*, 289 U. S. 361 this Court had for determination the effect of service of process on a statutory agent after the withdrawal of the foreign corporation from the state where service was made and not the effect of the revocation of the authority of the statutory agent upon the dissolution of the foreign corporation in the state of incorporation.

## POINT II.

**Service of process on statutory agent of foreign corporation after dissolution of corporate existence in state of incorporation, is a nullity.**

*National Surety Co.* v. *Cobb*, 66 Fed. (2d) 323, 325 (C. C. A. 5th); certiorari denied 54 Sup. Ct. Rep. 127;

*United States Truck Company* v. *Pennsylvania Surety Corp.*, 259 Mich. 422; 243 N. W. 311, 312;

*Robinson* v. *Mutual Reserve Life Insurance Co.*, 182 Fed. 850, 855; affirmed 189 Fed. 347;

*Restatement, Conflict of Laws*, Section 158, Chapter 6, subdivision c. page 229;

*Burns* v. *Niagara Life Ins. Co.*, 279 Pa. 453, 124A. 128.

## POINT III.

**The revocation of the designation of a statutory agent in Mississippi upon the dissolution of National Surety Company in the State of New York neither impaired the obligations of contracts nor violated Article 1, Section 10 of the Constitution of the United States.**

All persons in Mississippi who entered into contracts with National Surety Company after its admission to do business, had constructive knowledge of the charter of said company, its powers and limitations, and the statutory laws of creation and dissolution.

*Relf* v. *Rundle*, 103 U. S. 222, 225;

*Canada Southern Railroad Co.* v. *Gebhard*, 109 U. S. 527, 537;

*Martyne* v. *American Union Fire Insurance Co.*, 216 N. Y. 183, 193.

In contemplation, therefore, was the absolute cessation of corporate life, the restraining of officers and employees from further representing the company and the revocation of the authority of any of its agents, including statutory agents upon its dissolution in New York.

All contracting parties, thus, knew that the designation of the statutory agent was subject to immediate revocation upon the death of the corporate principal. The Court of Appeals construed this designation and revocation when it said "This designation was analogous to a power of attorney granted by an individual, which ceases upon the death of that individual" (R. 67).

Under these circumstances no contractual right of the Claimant was impaired in violation of Article 1, Section 10 of the United States Constitution.

It is submitted that none of the cases relied upon by Claimant are applicable to the situation where the designation of the statutory agent is revoked by the dissolution of the foreign corporation in the state of incorporation.

## CONCLUSION.

**It is therefore respectfully submitted that the decision of the court below was correct and that no federal question is presented for review. The petition for a writ of certiorari should, therefore, be denied.**

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940

No. 520

IN THE MATTER OF THE LIQUIDATION
*of*
NATIONAL SURETY COMPANY

Claim of WILLIAM F. LAUGHLIN, as Administrator de bonis non of the Estate of Wesley Cooper, Deceased,
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*against*

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(Petitioner-Respondent below).

## MOTION OF DEPARTMENT OF BANKING, STATE OF NEBRASKA, FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Banking, State of Nebraska.

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of Counsel.

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TO THE HONORABLE CHARLES EVANS HUGHES,
CHIEF JUSTICE OF THE UNITED STATES,
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, the Department of Banking of the State of Nebraska, respectfully shows:

1. That your petitioner is an executive arm of the Government of the State of Nebraska and is empowered by Nebraska statutes to act as official or statutory receiver of delinquent banking institutions.

2. Your petitioner as such statutory receiver is also a claimant in the liquidation proceedings of the National Surety Company, which company is being liquidated in the State of New York pursuant to the Insurance Laws of that state.

3. Your petitioner asks leave to file a brief as *amicus curiae* in support of the petition for a writ of certiorari to review a decision of the New York Court of Appeals dated May 28, 1940 (reported in 283 N. Y. 68) affirming a final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (fols. 178-183) which affirmed without opinion an order of the Special Term of the Supreme Court, New York County (fols. 10-14) affirming the disallowance of a claim by a referee (fols. 142-162).

## I.

## Statement of Matter Involved.

On June 1, 1934 the Superintendent of Insurance of the State of New York, pursuant to an order of the Supreme Court of that State, took possession of and became vested with legal title to the property of the National Surety Company and proceeded to liquidate its affairs in accordance with the Insurance Laws of the State (fols. 116-160).

The order of liquidation dissolved the company and directed all claimants to file their claims with the Liquidator in New York not later than April 1, 1935. The claimant, a citizen of Mississippi, filed sworn proofs of claim within the period prescribed by the liquidation order, but in-

voked his local forum, the Courts of the State of Mississippi, for the purpose of having the merits of his claim passed upon.

After the filing of the claim, claimant instituted a suit in the State of Mississippi against the National Surety Company setting forth that the action was on a bond executed and delivered in the State of Mississippi by the National Surety Company (fols. 106-108).

Process was served on the insurance company pursuant to the laws of Mississippi governing the admission of foreign insurance companies, which provided in substance that a foreign insurance company prior to engaging in business in Mississippi, be required to irrevocably appoint the Commissioner of Insurance of the State of Mississippi its agent for the service of process (fol. 149).

The summons was served on the Commissioner of Insurance of Mississippi pursuant to Mississippi law who delivered the summons to the Liquidator of the National Surety Company in New York City (fol. 29).

The National Surety Company defaulted in appearance and answer, with the result that judgment by default was entered against it (fols. 70-84).

The Liquidator and the Courts of the State of New York have declined to give full faith and credit to that judgment, holding that the State of Mississippi could exercise no jurisdiction over a foreign insurance company after the company had been dissolved in the state of its domicile, notwithstanding that the company had previously transacted the business of insurance in Mississippi by permission of the State. The Court below further held that the power of attorney filed by the National Surety Company, appointing the Commissioner of Insurance of the State of Mississippi its agent to receive process on its behalf (which power of attorney was pursuant to Mississippi statute, to continue so long as there were outstanding liabilities in the State of Mississippi), ineffective, and could

furnish no basis for *in personam* jurisdiction over the company in an action commenced after the dissolution of the company by a Mississipppi resident on a contract executed in the State of Mississippi.

## II.

## The effect of the decision below.

The decision of the Court of Appeals has an unsettled effect on the law relative to the qualifying of foreign insurance corporations in the several states. It seems to declare that the law of the chartering state of a corporation follows the corporation everywhere, and that when another state seeks to impose conditions upon such foreign corporations as a requisite to authority to transact business in such state, that such conditions are subordinate to the laws of the State of the corporation's domicile.

The State of Nebraska has (as other states have) required foreign insurance companies as a condition to transacting business in the State to file a written appointment of the Director of Insurance as its lawful agent upon whom process may be served. The purpose of such statutes obviously is to protect Nebraska citizens who may do business with such foreign insurers by subjecting the company to the jurisdiction of Nebraska Courts with respect to business transactions entered into with Nebraska citizens. In furtherance of that purpose, Nebraska (along with other states) has provided in its statutes (§ 44-407, Compiled Statutes of Nebraska as amended) that:

> "Such appointment (of the Director of Insurance as agent to receive process) and authority shall continue as long as any certificate of membership, policy, or liability remains outstanding against the company, corporation or association, in this state. The dissolution of any foreign insurance company shall not take

away or impair the right of any person to commence an action in this state against such companies or associations or their statutory successors as agents thereof and procure service upon such companies or their statutory successors as herein provided for any liability previously incurred."

Nebraska, had supposed, that to protect its citizens in its business dealings with foreign insurers, it had the power to require the foreign insurer as a condition of transacting its business to submit to its local forum. Nebraska had supposed, that by exacting such condition from a foreign insurer, that its citizens would not be required to seek the State of the corporation's domicile to protect their rights.

We are told now, by the Court below, that when a New York insurance company that had been transacting an interstate business, is dissolved, not only must claims be filed in New York, but that Mississippi and Nebraska citizens must come to New York to prove their claims. They may not, we are told, invoke the aid of their local forums for proof of their claims against the insolvent insurer.

In the liquidation of an interstate insurer, the statutory domiciliary liquidator acquires legal title to the property of the company wherever situated and if there are not sufficient local assets to satisfy the claims of local creditors, non-resident creditors would be compelled under the decision of the court below, to come to the state where the domiciliary liquidation proceeding is taking place in order to prove their claims. They may not if the decision below is sustained, invoke the aid of their local forums to prove their claims. We concede, of course, that in the liquidation of an interstate insurer the *filing* of a claim as distinguished from its proof may be required, as respects non-resident creditors, to be made in the jurisdiction of the domiciliary statutory liquidator. Thus is the liqui-

dator apprised of the existence and nature of the claims asserted. The further requirement, however, that proof of such claims is exclusively for the domiciliary jurisdiction is, we submit, erroneous.

This decision may compel each state, in order to protect its own citizens, to require foreign insurance companies to leave on deposit securities which would be available to local creditors in the event of insolvency of the company.

Heretofore it was thought that by requiring a power of attorney to be filed, a sufficient basis for personal jurisdiction over the corporation had been established and that in case of insolvency, a non-resident creditor could invoke his local forum to prove his claim just as he could invoke his local forum for purposes of suit while the foreign insurer was a going concern.

The foregoing demonstrates that the decision below has left the law with respect to qualifying of foreign insurers in an unsettled state which this court should clarify.

## III.

## Reasons relied on for granting the writ.

1. The Court of Appeals of the State of New York has decided a federal question of substance which is not in accord with applicable decisions of this Court as set forth in

*Washington, ex rel. Bond & Goodwin* v. *Superior Court,* 289 U. S. 361;

*Mutual Res. F. Life Ass'n* v. *Phelps,* 190 U. S. 147;

*Nierbo Co.* v. *Bethlehem Shipbuilding Corp.,* 308 U. S. 165.

2. The Court of Appeals of the State of New York has decided a federal question of substance which is of public

importance in that it leaves unsettled the law relating to the power of a state to impose conditions as to the qualifications of a foreign insurer to transact business in the several states, which should be settled by this court.

WHEREFORE, your Petitioner prays that a writ of certiorari be issued out of this Court as prayed for by petitioner-claimant, *Laughlin,* and that leave be granted to your petitioner to file a brief *amicus curiae* to the end that the order and judgment of the Court of Appeals be reversed by this Court and such other and further relief be granted as to this Court may seem just and proper, and your petitioner will ever pray.

Dated: New York City, November 4th, 1940.

DEPARTMENT OF BANKING,
STATE OF NEBRASKA,

By: WENDELL P. BARKER,
Counsel for Petitioner.

WENDELL P. BARKER,
MORRIS AMCHAN,
of Counsel.

Press of Fremont Payne, Inc.
[23455]